No. 85-5348

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAVID BUCHANAN
Petitioner,
v.
COMMONWEALTH OF KENTUCKY
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF OF AMICI CURIAE ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, GUAM, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, NORTH CAROLINA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, VIRGINIA, and WASHINGTON*

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INTEREST OF AMICI CURIAE

The amici curiae are states (and the Government of Guam) who have an interest in the issue of joinder for trial of defendants who have participated in the same act or series of criminal acts.

The amici submit this brief through their Attorneys General[1] pursuant to Sup.

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[1] The State of Connecticut joins this brief through its Chief State's Attorney, who is the chief criminal law enforcement officer of that state.

Ct.R. 36.4. This brief is presented in support of the Respondent Commonwealth of Kentucky.

ARGUMENT

PROPOSITION I

THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT THE EXCLUSION OF WITHERSPOON EXCLUDABLES IN A CASE WHERE A NON-CAPITAL DEFENDANT IS JOINED FOR TRIAL WITH A CAPITAL DEFENDANT WHEN THE DEFENDANTS PARTICIPATED IN THE SAME ACT OR ACTS WHICH CAUSED THE MURDER.

The Petitioner contends that death qualification of a jury in a case where a non-capital defendant has been joined for trial with a capital defendant violates the constitutional rights of the non-capital defendant.

The amici contend that the constitutional theories upon which the Petitioner's argument is based were rejected by the Supreme Court in the case of Lockhart v. McCree, 106 S.Ct. 1758 (1986).

The Petitioner cannot contend that exclusion of persons who refuse to consider the death penalty regardless of the facts and circumstances of the case are a cognizable class under Sixth Amendment principles, which require that a jury panel be selected from a representative cross-section of the community. See Lockhart, 106 S.Ct. at 1765.

Furthermore, in Lockhart the Supreme Court did not accept the statistical analysis which the Petitioner in this case again presents. Id. at 1761-64. The Court also specifically rejected the proposed application of the cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors. Id. at 1764-65.

This Court recognized the state's legitimate interest in death qualification of juries and held that there was little

danger that death qualification would be used as a means "to arbitrarily skew the composition of capital-case juries." Lockhart, 106 S.Ct. at 1766.

The present case involves the state's interest in the joinder of defendants who are alleged to have participated in the same act or transaction or the same series of acts or transactions which constitute an offense. Joinder of defendants under these circumstances is widely recognized. Fed.R.Crim.P. 8(b); 1 C. Wright, Federal Practice & Procedure, § 213 (1982).

In federal trials, it has been stated "[p]ersons indicted together should ordinarily be tried together." United States v. DeVeau, 734 F.2d 1023, 1027 (5th Cir. 1984). See also United States v. Lee, 743 F.2d 1240, 1248 (8th Cir. 1984) ("The general rule is that persons charged in a conspiracy should be tried together, par-

ticularly where proof of the charges against the defendants is based upon the same evidence and acts.").

The reason why joinder of defendants is a desirable practice is explained in Standards for Criminal Justice, § 13-2.2 commentary at 17 (1986):

> Seriatim trials increase the burden on victims and witnesses, delay the disposition of the charges, and expand the drain on prosecutorial and judicial resources. In addition, separate trials can produce inconsistent results which may undermine public confidence in the criminal justice system.

(Footnotes omitted). See also Bruton v. United States, 391 U.S. 123, 143 (1968) (White, J. dissenting).

Policy considerations supporting joinder of defendants in federal trials are so strong that it has been held that even if the conspiracy count that forms the sole basis for joinder is dismissed at the close of the government's case, the

defendants are not entitled to severance. Schaffer v. United States, 362 U.S. 511 (1960). Cf. United States v. Lane, 106 S.Ct. 725 (1986) (misjoinder of defendants constitutes a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial).

Lockhart recognized the state's interest in the unitary jury system, which "serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case." 106 S.Ct. at 1768. (emphasis added). The amici contend that the state has an equally valid interest in having a single jury decide all issues involving two or more defendants who participate in the same series of criminal acts, despite the fact that punishments may differ as to each.

This Court in Lockhart also acknowledged that the defendant himself might benefit from "'residual doubts' about the evidence presented at the guilt phase." Lockhart, 106 S.Ct. at 1769.

In the present case, where the state seeks the death penalty against one defendant but not the other, the amici contend that the non-capital defendant may benefit from the fact that the jury which decides his guilt or innocence is also aware that his capital co-defendant is being convicted and punished. It is in the interest of the non-capital defendant that the jury know that someone is being punished for what was done and to know exactly what that punishment is.

If the non-capital defendant is tried separately, the jury would not know what punishment the capital defendant received and might overreact with respect to decid-

ing the guilt or innocence and punishment of the non-capital defendant. This danger is particularly real in a case such as the present one, which involves a particularly outrageous set of circumstances committed by more than one defendant.

The amici contend that it is appropriate that one jury decide guilt or innocence and assess levels of punishment with regard to all actors in a criminal episode.

Furthermore, if this Court decides that a state must try a capital defendant and a non-capital defendant separately, this may encourage prosecutors to request the death penalty against an undeserving defendant in order to avoid separate trials.

Additionally, defendants who receive a life sentence after the state has attempted to obtain a death sentence could

claim that they were denied a fair trial because the state should not have sought the death penalty in their case. This would lead to endless post-trial second-guessing about whether the prosecutor's decision to seek the death sentence was appropriate.

Lockhart laid to rest the issue of whether the constitutional rights of a capital defendant who received a life sentence were violated when the issues of guilt, innocence, and punishment were decided by a death qualified jury. The petitioner McCree in the Lockhart case received a punishment of life without parole. The amici contend that since this Court held that the petitioner in Lockhart received the fair trial, there is no difference between his case and the present one. If the trial was fair for the petitioner in Lockhart on the issue of

guilt, and if it is fair for defendants who receive the death penalty imposed by a death qualified jury, it should be held to be fair to the Petitioner in the present case.

Additionally, if this Court were to hold that a non-capital defendant is entitled to severance from a capital defendant, there is no reason why a capital defendant would not have the right to insist that he receive a separate trial with regard to the non-capital crimes he was charged with that arose out of the same transaction.

The Court has mandated constitutionally required severance in only one circumstance, that is, when the introduction of a co-defendant's confession would deny the defendant his right to confrontation of witnesses. Bruton v. United States, 391 U.S. 123 (1968). See also Lee v.

Illinois, 106 S.Ct. 2056 (1986). The amici request that this Court reject what would be an additional theory of constitutionally required severance.

This Court's ruling in Bruton was justified because the introduction of a confession against a non-testifying defendant violated a specific provision of the United States Constitution, that is, the Sixth Amendment's guarantee of the right to confrontation of witnesses. However, the Petitioner in the present case can point to no specific constitutional provision which was violated by the joinder of his case with that of his co-defendant.

This is particularly true since, as noted above, this Court has rejected the contention that exclusion of Witherspoon excludables denies a defendant the right to a fair cross-section of the community being represented on his jury. Instead,

the Petitioner must rely only on the more general principles of the Due Process Clause of the Fourteenth Amendment. However, in Donnelly v. De Christoforo, 416 U.S. 637, 643 (1974), the Court made the following statement when it rejected a contention concerning a prosecutor's closing argument:

> This is not a case in which the State has denied the defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972), or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. Griffin v. California, 380 U.S. 609 (1965). When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them.

(Footnote omitted).

In the present case, since no specific guarantee of the Bill of Rights has been violated, the Petitioner cannot con-

tend that the Fourteenth Amendment imposes a bar to the state's interest in requiring defendants who commit a series of criminal actions together to be tried jointly.

For the reasons stated, the amici request that the Petitioner's arguments relating to the exclusion of Witherspoon excludables be rejected.

PROPOSITION II

THE LIMITED HOLDING IN ESTELLE V. SMITH IS INAPPOSITE BECAUSE THE LANGE REPORT WAS PRESENTED TO REBUT EVIDENCE PRESENTED BY THE PETITIONER; FURTHERMORE, ESTELLE ALSO DOES NOT APPLY BECAUSE THE PETITIONER: (1) PRESENTED A DEFENSE OF EXTREME EMOTIONAL DISTURBANCE; (2) KNEW THE SCOPE OF THE EVALUATION SINCE IT WAS REQUESTED BY HIS OWN COUNSEL; AND (3) WAS NOT QUESTIONED CONCERNING THE CIRCUMSTAMCES OF THE OFFENSE FOR WHICH HE WAS CHARGED.

The amici contend that the decision of this Court in Estelle v. Smith, 451 U.S. 454 (1981), is readily distinguishable from the present case, since here a

competency report was introduced by the Commonwealth only after the Petitioner had introduced psychiatric evidence from other governmental reports, and selectively offered only those portions which would support his defense of extreme emotional disturbance.

In Estelle v. Smith, 451 U.S. at 468, the Court held:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.

(Emphasis added). These important distinctions were recognized by the court in United States v. Byers, 740 F.2d 1104, 1110-11 (D.C. Cir. 1984) (Scalia, J., plurality opinion).

The Petitioner in the present case introduced psychiatric evidence by ques-

tioning his social worker concerning several evaluations of him made by personnel in the Commonwealth's juvenile justice system. Those evaluations focused upon his limited intelligence and emotiona' makeup. All of those evaluations were conducted prior to the date of the crime in the present case (JA 39-48).

One of those psychological evaluations in particular serves as a basis of distinction from the situation in Estelle v. Smith. The Petitioner himself offered evidence of his future dangerousness by the reading of his August 21, 1980, psychological evaluation by Dr. Robert W. Noelker, a licensed clinical psychologist. That report reflected, in relevant part:

> In view of the presence of extreme unmet dependency needs, early and sustained frustration, and minimal success in almost any endeavor there exists the strong probability that underlying considerable passivity and and [sic] withdrawal if exten-

> sive anger and perhaps even range. Thus, under the proper circumstances, David could be expected to be dangerous with respect to acts against persons. While this has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition.

(Emphasis added). (JA 45,65). Such expert psychiatric testimony certainly would have been admissible against the Petitioner to establish future dangerousness as an aggravating circumstance had the death penalty been sought. See Barefoot v. Estelle, 463 U.S. 880 (1983).

The amici submit that refusal to allow the Commonwealth to cross-examine the social worker concerning the Petitioner's competency evaluation completed at his request in connection with the instant crime would "deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." Estelle v.

Smith, 451 U.S. at 465. See also United States v. Byers, 740 F.2d at 1110.

At issue was whether the Petitioner suffered from extreme emotional disturbance. As the Kentucky Supreme Court aptly reasoned, the Petitioner opened the door for introduction of the Dr. Lange competency report[2] by introducing only those Department of Human Resources reports beneficial to him. Commonwealth v. Buchanan, 691 S.W.2d 210, 213 (Ky. 1985).

Furthermore, Dr. Lange's report had been prepared at the joint request of the Petitioner's attorney and counsel for the Commonwealth in district court juvenile proceedings prior to Petitioner's transfer

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[2] The August 17, 1981, document was reported in both the testimony of the social worker and the Kentucky Supreme Court opinion to have been authored by a "Dr. Ryan." Apparently the misnomer was either a reading mistake by the social worker or a transcription error by the court reporter.

to circuit court. In fact, counsel for the Petitioner had the opportunity to question Dr. Lange regarding the report on August 19, 1981. (See tape of the August 19, 1981 juvenile hearing). Additionally, a request for a follow-up examination was made with the admonition of the trial court that no inquiry be made of the Petitioner "regarding the circumstances of the offenses which are charged against him." (See transcript of November 28, 1981 hearing, Tr. 11-17).

In Alvord v. Wainwright, 725 F.2d 1282, 1293 (11th Cir. 1984), cert. denied, 469 U.S. 956 (1984), the United States Court of Appeals for the Eleventh Circuit distinguished Estelle v. Smith, in part, because trial counsel for the defendant Alvord requested the psychiatrist to examine Alvord.

The cross-examination of the Petitioner's social worker can be construed as a rebuttal of the Petitioner's emotional disturbance defense rather than an impermissible presentation of evidence of future dangerousness condemned by this Court in Estelle v. Smith, 451 U.S. at 467. The report by Dr. Lange recited no conclusions based upon statements by the Petitioner concerning his crimes. Cf. United States v. Stockwell, 743 F.2d 123, 125-26 (2d Cir. 1984) (prosecutor was within legitimate bounds of cross-examination in challenging an insanity defense by use of information gleaned from the defendant during his psychiatric examination).

Furthermore, the Lange report did not offer any improper opinions regarding the Petitioner's criminal responsibility. Cf. Cape v. Francis, 741 F.2d 1287, 1294 (11th Cir. 1984), cert. denied, 106 S.Ct. 281

(1985) (admission of diagnosis regarding criminal responsibility based on the substance of disclosures made during a custodial interrogation was harmless).

To permit the Petitioner to edit his juvenile file for selective use of favorable information in presenting a defense of extreme emotional disturbance without allowing the Commonwealth to rectify any incomplete impressions created by such use of the file on a claim of violation of the Fifth and Sixth Amendments would insulate any defendant from a challenge to his defense of insanity or diminished mental capacity. This Court has repeatedly recognized that matters ordinarily not admissible in the state's presentation of its case-in-chief may be admissible upon cross-examination as impeachment evidence. See Harris v. New York, 401 U.S. 222 (1971). See also Fletcher v.

Weir, 455 U.S. 603 (1982); Anderson v. Charles, 447 U.S. 404 (1980); Jenkins v. Anderson, 447 U.S. 231 (1980). Cf. Wainwright v. Greenfield, 106 S.Ct. 634 (1986) (evidence of post-arrest silence as affirmative proof of sanity rather than as impeachment evidence violates due process).

Because the present situation is not an example of self-incrimination without warnings as condemned in Miranda v. Arizona, 384 U.S. 436 (1966), nor an instance in which counsel for the accused has no notice of the scope of the interrogation, the amici submit that application of Estelle v. Smith, 451 U.S. 454, is inapposite, as the Kentucky Supreme Court concluded. Reaching a contrary conclusion would severely cripple a prosecutor's right to cross-examine defense witnesses on issues relevant to that defense.

CONCLUSION

For the reasons stated, the amici respectfully request that the decision of the Supreme Court of Kentucky be affirmed.

Respectfully submitted,

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